No. 3772

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. B. CASSERLY,
Plaintiff in Error,

vs.

REY B. WHEELER,
Defendant in Error.

REPLY BRIEF FOR DEFENDANT IN ERROR.

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I.

IN RE STATEMENT OF FACTS.

We do not propose to further burden this Honorable Court with a controversy with defendant concerning the facts of this case.* With the Transcript of Record before you, we know your Honors will experience no difficulty in determining the facts, irrespective of the claims relative thereto by plaintiff and defendant, respectively. Suffice it for us to state, however, that our first Brief contains a "Statement of the Case" which, the Transcript

* Plaintiff in error will be referred to herein as defendant, and defendant in error, as plaintiff.

readily discloses, is supported in every detail by the Record, and no question is raised by defendant's counsel as to its accuracy.

Counsel's admissions, on pages 2 and 3 of their Reply Brief, that plaintiff's arrest was without warrant, that plaintiff was not guilty of any crime, and that an error had been made in apprehending plaintiff, taken in connection with defendant's admission that he did not see plaintiff commit any offense, that he did not make an investigation of his own to ascertain whether he was making a mistake, *but simply followed Mr. Dolly's instructions to the letter,* conclusively establishes defendant's liability herein. Under such circumstances, citation of authorities is unnecessary to show that the arrest was unlawful, without reference to grounds for suspicion or belief (see Sec. 837, Penal Code of California).

Notwithstanding counsel for defendant's statement to the contrary, the theory of plaintiff's action is that defendant, under the circumstances shown here, had no legal right, authority or justification to arrest and detain plaintiff; that the defense of probable cause, as pointed out on page 21 of our first Brief, is not available in an action for damages for false imprisonment; and, finally, were such a defense applicable, the evidence herein wholly fails to show there was probable cause for the arrest and detention of plaintiff by defendant; or, that defendant, under the circumstances related, had reasonable ground to believe that plaintiff was either

a deserter, draft evader, or delinquent under the "Selective Service Act". The sole question presented, therefore, is whether or not there was legal justification, under all the circumstances, to warrant the arrest and detention of plaintiff by defendant. The facts, as summarized on pages 4 to 9, and particularly those enumerated on pages 2 and 3 of our first Brief, which counsel for defendant on pages 2 and 3 of their Reply Brief now frankly concede, clearly warranted the ruling of the learned Trial Judge that there was neither legal justification, probable cause, nor reasonable grounds for the arrest and detention of plaintiff herein. Defendant's own testimony, which we are particularly desirous of impressing upon your Honors, and which is found on pages 62, 63, and 79 of the Transcript, is decisive of the questions of legal justification, or, of probable cause, assuming but not admitting that such a question is involved herein.

Appreciating its damaging effect, counsel make a feeble attempt to claim the facts were brought to the attention of the defendant before he arrested and restrained plaintiff. Mr. Dolly did not testify he communicated the circumstances to defendant. He stated he was not positive (Tr. p. 65). Defendant's own testimony conclusively shows he did not (Tr. p. 63):

> "I said, 'You must consider yourself here under detention'. 'Why?' 'I don't know,' I said. Nor did I know what the man was wanted for."

Likewise, the futile claim that plaintiff was given permission and did, in fact, telephone to friends. William L. Curtin (Tr. pp. 81, 82), Charles A. Baum (Tr. pp. 82, 83) and Bertha J. Baum (Tr. pp. 85, 86) testified positively they did not see plaintiff actually use the telephone. Their testimony fully corroborates plaintiff's statement that he was not given permission, and did not, in fact, use the telephone (Tr. pp. 87, 88). It is rather queer, if plaintiff was granted permission and did, in fact, use the telephone, none of these witnesses would so testify. It is also significant that defendant did not take it upon himself to make inquiries over the telephone concerning plaintiff, if plaintiff did in fact use the telephone. Here was defendant's opportunity to obtain information over the telephone which would have enabled him, without delay, to have determined that plaintiff was not Nolan, **who was wanted for embezzlement,** nor in any sense a deserter, draft evader or delinquent under the "Selective Service Act", and that plaintiff and his family were in good standing in the community. *The truth is, however, as defendant frankly admits (Tr. p. 62), he simply followed Mr. Dolly's instructions to the letter, and did not investigate or make an investigation of his own to ascertain whether he was making a mistake or not.*

II.

INSUFFICIENCY OF EXCEPTIONS.

It is argued by defendant that, in view of the fact that the Court's instructions contained one single, definite proposition of law, defendant's general "exception to all of the instructions" is sufficient to require the matter to be reviewed. A mere reading of the instructions will readily disclose counsel's error. The instructions do not contain one single definite proposition of law, but state numerous propositions of law on various subjects. That counsel so considered the instructions is apparent from defendant's assignments of error contained on pages 101 to 105 of the Transcript, and on pages 5 to 8 of his Opening Brief where error is alleged regarding various principles of law stated by the trial Court to the jury. Hence, defendant's general exception was wholly insufficient because it absolutely failed to specifically and distinctly direct the trial Court's attention to the particular part of its charge intended to be complained of so as to afford the Court an opportunity of withdrawing or correcting the part complained of, if, in the consideration of the exception, the Court deemed it well founded. As stated in one of the cases cited by defendant's counsel:

> "Their definiteness is demanded to the end that the trial Court may be pointedly advised as to what the objection relates to so that it may have an opportunity to eliminate the

vicious part, if any, and thus save the expense and delay of a new trial."

Bernhart v. City etc. Co., 263 Fed. 1009, 1016.

The further claim of counsel that the trial Court indicated its assent to the exception taken by defendant, is wholly without merit. To construe the colloquy between Court and counsel (Tr. p. 97) as the Court's assent to the form of the exception, would be doing violence to language. It is well to note that the learned trial Judge, upon settlement of the bill of exceptions, expressed the following opinion (Tr. p. 14):

"While, I doubt the sufficiency of the exceptions to the instructions, it is thought the question is for the Appellate Court rather than the trial Court.

Sept. 1-21.

Dietrich,
Judge."

We respectfully submit that, under the authorities cited in our first Brief, page 10 thereof, defendant's exception is clearly insufficient to support the assignments of error based upon it.

III.

IN RE LAW OF FALSE IMPRISONMENT.

On page 10 of our first Brief, a number of cases, decisive of the question involved herein, are cited. These cases evidently rise like the "Rock of Gibraltar" before counsel, for they are forced to con-

cede that they "declare doctrines which nobody disputes". To escape the force of these cases, however, the absurd claim is advanced that, because "the facts of the cases cited show ordinary arrests in time of peace", the Constitutions of the United States and California are not the same protecting instruments in war as in peace, and that Congress can divest, and has divested, by the "Selective Service Act", the rights guaranteed under these Constitutions. In substance, it is their doctrine—has been the doctrine of the United States Attorney's office ever since the advent of the present incumbent—and is the doctrine of their Briefs printed and filed in this case that, although there was no war in San Francisco where this draft board sat, yet, if there was a war anywhere else, to which the United States was a party, the technical effect of such war, under and by virtue of the "Selective Service Act", was to immediately suspend Articles 4 and 5 of the Amendments to the Constitution of the United States, Section 13 of Article I of the Constitution of the State of California, and Sections 236, 825, 835, 836, 837, 841, 847 and 849 of the Penal Code of the State of California, and to take the jurisdiction away from the civil Courts and transfer it to the draft officers or Department of Justice operatives; that, therefore, during the World War, a man could be arrested without warrant, kept in prison during the pleasure of a draft officer or operative of the Department of Justice, without being informed of the charge against him,

or being taken before a magistrate, or given the opportunity of explaining the charge, or to furnish bail, or to communicate with counsel, his friends, family or employer; his papers could be searched without warrant, his property could be confiscated behind his back, and he had no earthly means of redress simply because the United States was at war in Europe; and, **all this**, in the midst of a community whose social and legal organizations had never been disturbed by any war, where the Courts were wide open, where judicial process was executed every day without interruption, and where all the civil authorities, both State and National, were in full exercise of their functions. To us, this seems the wildest delusion that ever took possession of the human brain. We do not see how any man of common sense can stand up and contend for it. It seems an odd coincidence that the same identical argument, advanced by defendant herein, was made on behalf of the Government in the historic case of

Ex parte Milligan, 4 Wall. 2; 18 L. Ed. 281,

and it affords us extreme pleasure, indeed, to quote the following pertinent language of the Court in reply thereto:

> "Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed

> just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. **The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.** Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

To the same effect, see cases cited on pages 19 and 20 of our first Brief, particularly the language of Judge Breese. It is worthy of more than passing notice that, although these cases are a complete answer to counsel's constant **hue** and **cry** about *"war time"*, *"grave emergency"*, and *"public necessity"*, no reply is made thereto. Instead, counsel beg the question completely.

IV.

"SELECTIVE SERVICE ACT" AND REGULATIONS ISSUED THEREUNDER.

Notwithstanding counsel's repeated reference to the Draft Act and the regulations thereunder, the following remain unchallenged by counsel:

1. The rights guaranteed individuals by (a) Articles 4 and 5 of the Amendments to the

Constitution of the United States; (b) Article I, Section 13 of the Constitution of California; and (c) Sections 236, 825, 835, 836, 837, 841, 847 and 849 of the Penal Code of the State of California.

2. That Congress, by the "Selective Service Act", or any other act, has no power to divest these rights.

3. That the "Selective Service Act" does not divest these rights, for no power or authority is given therein to a member of a Draft Board to direct or authorize the arrest and detention of one suspected of being guilty of evasion of the terms of said Act, other than to proceed to make the usual and necessary complaint before some officer or Grand Jury authorized to receive it, as provided by Chapter 18, Title 13 of United States Statutes, and Sections 847 and 849 of the Penal Code of the State of California.

4. That the Constitutions of the United States and California are **the same protecting instruments in time of war as in peace,** and no one has a right to urge *"war time necessity"*, or *"grave emergency"*, "as a plea for the usurpation of powers not granted".

5. Defendant's admissions that he did not see plaintiff commit any offense, that he did not make an investigation to ascertain whether he was making a mistake, or whether plaintiff had committed any crime, but that, in arresting and detaining plaintiff, he simply followed Mr. Dolly's instructions to the letter.

In view of the foregoing, neither the "Selective Service Act", nor the regulations thereunder, have any application to the instant case. It is evident counsel argue upon a wrong premise, namely: that defendant made an independent investigation, and

from that investigation he had reasonable ground to believe that plaintiff was either a draft evader, deserter or delinquent under the "Selective Service Act." **Here, however, defendant arrested and detained plaintiff without any investigation.** If, therefore, defendant arrested and detained plaintiff without any investigation, how can it be successfully claimed there was probable cause for the arrest and detention of plaintiff, or that the defendant had reasonable ground to believe that plaintiff was either a draft evader, deserter or delinquent under the "Selective Service Act"?

Nor can the portion of the "Selective Service Act", quoted by counsel, be construed as authority to draft officers or operatives of the Department of Justice to arrest and detain a person for twenty-two hours, or any number of hours, pending an investigation. The regulations provide for an investigation before an arrest and detention rather than an arrest and detention before an investigation, as claimed by counsel. If defendant's contention be true, then the "Selective Service Act" superseded constitutional and statutory provisions of the United States and the State of California relative to the arrest and imprisonment of American citizens. We respectfully submit this view is wholly inconsistent with well established principles of constitutional law.

Here, we again invite the Court's attention to Ex parte Jones, 208 S. W. 525, where petitioner

was arrested, without warrant, upon the verbal request of the chairman of the local exemption board, and restrained of his liberty from Monday to Saturday. What was there stated by the Court is decisive, in our opinion, of the question before us. The language contained in the decision could not be plainer, and counsel's criticism thereof is absolutely ill founded. Because no Brief had been filed for the sheriff, counsel argue that various portions of the "Selective Service Act" did not come to the attention of the Court, and, therefore, its reasoning is not well based. Suffice it to state, the case fully supports our contention that nowhere in the "Selective Service Act" is any power or authority given a member of a draft board to direct or authorize the arrest and detention of one whom he may suspect of being guilty of evasion of the terms of said Act, other than to proceed to make the usual and necessary complaint before some officer authorized to receive it.

Great reliance seems to be placed by defendant upon the case of Michel v. Smith, 63 Cal. Dec. 230, but we find nothing there favorable to defendant. In the first place, the case is directly contrary to the doctrine declared in Ex parte Milligan, supra, and, secondly, the Supreme Court of this state in said case did not hold contrary to the Jones case, supra, nor did it hold that the arrest for an evasion of the Draft Act was not to be tested by the ordinary State law in respect to arrests, but was to be determined by the provisions of the "Selective Service Act", as

counsel for defendant erroneously states. The truth is the "Selective Service Act" was not even considered, or construed, in the Michel case. The Court simply held that, under the circumstances related, the defendants had reasonable grounds to believe that plaintiff was a deserter. In truth, there is no real analogy between that case and the case here. It is axiomatic that each case must be examined upon its own peculiar facts, for perhaps no two cases will be found to present the same facts for consideration. *All the facts present in this case are conspicuous by their absence in that case.* There, the defendant, as police officers, acting upon their own initiative, **first** interrogated plaintiff, and inquired into all particulars, and **then,** in the exercise of their judgment as arresting officers, and in the further exercise of the authority given them by law of arresting persons that they suspect, arrested the plaintiff, because, from their interrogation and inquiry, they had reasonable ground to believe that plaintiff was a deserter, and the Court so held. Here, however, we are confronted with an entirely different situation. Defendant neither interrogated plaintiff, nor inquired into any of the particulars, nor exercised his authority or judgment as an arresting officer, nor made the arrest because he had reasonable or any grounds to believe that plaintiff was a deserter, draft evader or delinquent under the "Selective Service Act" but only and solely because Mr. Dolly told him. Further, in the Michel case, the defendants apprehended plaintiff as a

deserter from the United States Army. In our case, plaintiff was arrested neither as a deserter, draft evader or delinquent under the "Selective Service Act". In fact, defendant frankly admits (Tr. p. 63) he did not know why he arrested plaintiff. Again, in the Michel case, plaintiff was guilty of neglect in that he failed to obtain from his local board evidence that he had notified it of his change of address from Oakland to Los Angeles. In the instant case, plaintiff was guilty of no neglect or omission of duty. He had fully complied with all the laws to which he was subject, and, in no way, was he responsible, directly or indirectly, for his arrest and detention. Further, in the Michel case, plaintiff not only failed to notify defendants that his parents lived in Los Angeles, but he did not have on his person, aside from his registration and classification cards, any means of identification by which he could be identified, or by which the defendants could have easily and quickly avoided the error or mistake. In the case at bar, plaintiff notified defendant of the name of his employer, and asked to communicate with his family and friends in Alameda and San Francisco. He also had on his person certain means of identification by which the error of defendant could have been easily avoided. For instance, he had his registration and classification cards, a seaman's passport and water front pass, with his photograph thereon. Finally, in direct conflict with its own decisions (Nelson v. Kellogg, 162 Cal. 621; Neves v. Costa, 5 Cal. App.

111-117) and the weight of authority (25 Corpus Juris, page 450, notes 58 and 59, page 451, notes 60 and 61; Polonsky v. Pennsylvania R. W. Co., 184 Fed. 558) the Court considered "probable cause" as a defense, and held that the facts showed defendants had probable cause for making the arrest. Here, the evidence, particularly defendant's admissions that he did not see plaintiff commit any crime in his presence, that he did not make any investigation of his own to ascertain whether plaintiff had committed any crime or whether he was making a mistake in arresting and detaining plaintiff, and that he did not know why he arrested the plaintiff, precludes any consideration of the question of probable cause. Counsel's contention that defendant had a right to rely upon Mr. Dolly's instructions to arrest and detain plaintiff, without any investigation on his part, and that Mr. Dolly's instructions constituted "probable cause" or reasonable grounds for arresting and detaining plaintiff, finds no support either in reason or the authorities. Complete answer to this claim is found in the following language of

Ex parte Orozco, 201 Fed. 106, at page 112:

> "The power to arrest without warrant and to deprive the individual of his liberty without due process of law has no existence in this country. **It has not been committed to any official, however high his station, nor to any department of the government, either executive, legislative, or judicial. Every department must act in obedience to the mandates of the Constitution. No one of them may usurp powers forbidden by that instrument, and none**

> **of them may perform acts in violation of its commands.** When, therefore, an individual is arrested without warrant, in disregard of the fourth amendment, and imprisoned without due process of law, in violation of the fifth, the arrest and imprisonment are unlawful, and cannot be sustained in a court of justice."

In the words of the learned Trial Judge (Tr. p. 94):

> "If Dolly had information warranting him to believe that the plaintiff was attempting to commit a crime, he should have presented it to a magistrate with a request for a warrant, or at least made it before a duly constituted arresting officer for his information."

The Court, therefore, can draw but one conclusion from the evidence, namely: that defendant had neither legal right, authority, justification, probable cause, nor reasonable grounds for arresting and detaining plaintiff.

In view of the foregoing, we respectfully submit that the action of the Trial Court was proper, and that its judgment herein should be affirmed.

Dated, San Francisco,
March 29, 1922.

Respectfully submitted,

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